JD-01-10
Burlington, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NFI INDUSTRIES, INC.,

and

WAREHOUSE EMPLOYEES UNION LOCAL 169 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

Case 4–CA–36842

Margaret McGovern, Esq. (Region 4, NLRB),
of Philadelphia, Pennsylvania, for the General Counsel

James R. Redeker, Esq. (Duane Morris LLP),
of Philadelphia, Pennsylvania, for Respondent

Claiborne S. Newlin, Esq. (Meranze and Katz),
of Philadelphia, Pennsylvania, for the Charging Party

DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that maintained an employee handbook at its approximately 50 facilities with unlawfully overbroad restrictions on disclosure of pay and other information. The General Counsel of the National Labor Relations Board (Board) issued an unfair labor practice complaint over the handbook restrictions, and other matters arising out of a union organizing effort at the employer's Burlington, New Jersey facility. The employer then revised the offending handbook provisions. It posted the revisions at all of its facilities (with the exception of the Burlington facility that had been the subject of the organizing drive). The employer also distributed copies of a letter announcing the handbook revisions to employees at each of the facilities (again, with the exception of the Burlington facility).

The stipulated remaining issue in dispute is one of remedy for the handbook violations. The employer concedes that its original handbook provisions violated Board precedent. It agrees that, at its Burlington facility, it must post a Board notice to employees as part of the remedy for the violation. However, the employer contends that Board precedent requiring the posting of a Board notice at each location where the unlawful handbook provisions were maintained is unnecessary. The employer contends that at facilities other than the Burlington facility, because it has taken action on its own to revise the unlawful handbook provisions, and to post and disseminate notice of the revisions to employees, a Board-ordered notice posting is unwarranted.

The Government and the charging party—the union involved in organizing the Burlington facility--contend that a Board notice-posting remedy is appropriate at each facility where the unlawful handbook provisions were maintained. They contend that the employer's remediation

efforts—the posting and distribution to employees of its rule revisions—does not obviate the necessity for a Board posting at each facility at which the unlawful handbook provisions were maintained.

Statement of the Case

On June 12, 2009, the Warehouse Employees Union, Local 169 (Union) filed an unfair labor practice charge, docketed by Region 4 of the Board as Case 4–CA–46832. The charge alleged that NFI Industries, Inc. (NFI or Employer) was violating the National Labor Relations Act (Act). The Union filed an amended charge in the case on July 2, 2009, and on August 21, 2009, filed a second amended charge.

On August 21, 2009, the Board's General Counsel, acting through the Regional Director for Region 4, issued a complaint against NFI, alleging that NFI was violating Section 8(a)(1), and (3) of the Act. Specifically, the General Counsel alleged that NFI maintained certain rules and policies in its employee handbook, applicable to all of its facilities that were violations of the Act. The complaint also alleged the promulgation of certain rules and certain conduct by NFI, undertaken at its Burlington, New Jersey facility, some of it in response to and/or to discourage union activity. NFI filed an answer to the complaint on September 4, 2009, denying all alleged violations of the Act.

On August 13, 2009, pursuant to an informal settlement agreement, the Regional Director issued an order withdrawing several paragraphs of the complaint, leaving as the only alleged violation of the Act NFI's maintenance of rules and policies in its employee handbook, applicable to all of its facilities.[1]

A hearing in this case was held November 2, 2009 by telephone, with counsel for all parties participating. The parties waived their right to present testimony, and, instead, submitted into evidence a Joint Stipulation of Facts and Issues. That stipulation, along with the formal papers contained in General Counsel's Exhibit 1, and the transcript of the hearing, constitute the record in this matter. The General Counsel and the Employer filed briefs in support of their positions on December 7, 2009. On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent has been engaged in the operation of distribution centers throughout the United States, including one in Burlington, New Jersey, and that during the last year Respondent has purchased and received at the Burlington facility goods valued in excess of $50,000 directly from points outside the State of New Jersey. The complaint further alleges, Respondent admits, and I find that Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulate (Jt. Stip. at ¶3) that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

[1] In the August 13, 2009 order the General Counsel withdrew the allegations of paragraphs 6, 7, 8 and the portions of paragraph 9 related to paragraphs 6, 7, and 8.

Findings of Fact

NFI operates distribution centers throughout the United States, including one in Burlington, New Jersey. NFI admits that it maintained the following rules and policies in its employee handbook, applicable at all (approximately 50) of its facilities:

> . . . [**DISCIPLINE** at page 12)
>
> 27. Disclosing confidential payroll information to others.
>
> ... (at page 17)
>
> **SALARY CONFIDENTIALITY**
>
> The Company takes precautions to assure that your pay rate and the amount of your paycheck is confidential and it is expected you do the same. This is a private matter between you and The Company and should not be disclosed to others. Failure to comply with this request will be considered grounds for immediate termination.
>
> ... (at page 30)
>
> **CONFIDENTIALITY**
>
> Naturally, all company affairs are strictly confidential. Employees should never discuss or disclose to persons outside The Company or any other employees who do not have a need to know (without the written authorization of the President of The Company), confidential company information, particularly relating to services, customers, pricing, vendors, wage rates, expenses, systems, policies or procedures.

While Respondent admits maintaining these rules "at all material times" until September 14, 2009, there is no pending complaint allegation or evidence that any NFI employee was disciplined or discharged for violating these handbook rules. Respondent's search of its personnel files uncovered no evidence of any such action taken against any employee for breach of these rules.

Effective on or about September 14, 2009, Respondent posted a revision to these rules at all of its warehouses and logistics facilities except the Burlington, New Jersey warehouse. This notice stated:

> **NOTICE TO ALL EMPLOYEES**
>
> **NFI Distribution is in the process of revising its Employee Handbook and expects that an updated version will be available for you in the near future. In the meantime, we want to bring to your attention several changes, effective immediately.**
>
> **1. Disciplinary Rule 27 on page 12 pertaining to confidential payroll information and the policy titled SALARY CONFIDENTIALITY on page 17 are revoked and being removed from the policies of the Company.**

2. The policy titled CONFIDENTIALITY on page 30 has been modified to remove the words "wage rates" and to add clarifying language. These changes are intended to eliminate any limits that employees believe may exist on their right to discuss their wages and working conditions among themselves or with others.

The policy of the Company pertaining to confidentiality of information now reads:

CONFIDENTIALITY

All company affairs are strictly confidential. Employees should never discuss or disclose to persons outside The Company or to any other employees who do not have the need to know, (without the written authorization of the President of The Company). Confidential company information, particularly relating to services, customers, pricing, vendors, expenses, systems, policies or procedures that do not relate to the terms and conditions of the employment of company employees. Some employees may be required, as part of their employment, to sign a separate Confidentiality Agreement and/or Propriety Agreement. All employees are required to maintain as confidential, any confidential information of The Company as defined in this policy and in the Confidentiality Agreement and/or Propriety Agreement.

3. The current Handbook is silent with respect to access to the Company's premises by off-duty employees. To answer any questions employees may have concerning this subject and to ensure that all of our facilities operate with the same rules, again, effective immediately, the following rule regarding access to Company premises applies to all Company facilities and property:

ACCESS TO COMPANY PREMISES

The Company has a very active business and the area around its buildings is often congested with truck and automobile traffic, creating safety risks to all pedestrians.

Employees are encouraged to be careful when on the property surrounding our building(s) and to go to and from buildings promptly, without loitering or "hanging around." While all employees must keep in mind the Importance of safety, especially around driveways and parking lots, off-duty employees are not prohibited from being on the property of the Company, so long as they remain outside of the buildings. Off-duty employees are prohibited from being in any of the Company's buildings, unless they are actively going to or from work.

Non-employees are prohibited from being on the Company's property or in its buildings at all times, unless they are invited onto the property by the Company for the purpose of conducting business with the Company.

If you have any question about these changes, please contact your facility manager.

(Emphasis in original.)

Also on or about September 14, 2009, NFI distributed copies of the foregoing notice, with minor changes, in the form of a letter dated September 2, 2009, from NFI's human resources department to employees at all its facilities except the Burlington, New Jersey

warehouse.

On or about September 23, 2009, Respondent reposted its notice previously posted September 14, with some minor corrections, at the same facilities, again excluding Burlington.[2]

Through these notices and letter, Respondent communicated the revised rules to its employees (with the exception of Burlington facility employees) at approximately 50 facilities, across the country in approximately 18 States. There were no other communications to NFI's employees concerning the revisions to the handbook.

Analysis

Respondent admits, and does not challenge, that the handbook rules prohibiting the disclosure of payroll, salary, and "company information, particularly relating to . . . wage rates," in place at its facilities until September 2009, and set forth above, "are overly broad and violate the Act." (Jt. Exh. 1 at ¶4.) Respondent is correct. Under settled Board precedent, the maintenance of such rules is violative of the Act. *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *Waco, Inc.*, 273 NLRB 746, 748 (1984); *International Business Machines Corp.*, 265 NLRB 638 (1982); *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976). Accordingly, Respondent's maintenance of the rules violated the Act, as alleged in the complaint.[3]

The nub of the dispute between the parties is the appropriate remedy for NFI's admitted violation of the Act.[4]

The affirmative action the Board typically orders in a handbook violation case—at least in cases, like this one, where no discipline has resulted from the maintenance of the unlawful rule—includes the posting of and obedience to a Board designated informational notice. In the notice, the employer informs employees that it will not engage in the proscribed conduct found

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[2]The text of the posted notices and the letter to employees was almost identical, each containing a few minor changes from the others. None of the differences are material to the issues in dispute. Copies of the original documents are in the record as attachments to the Joint Stipulation of Facts and Issues.

[3]The complaint issued before NFI's revisions to the handbook, and therefore, the complaint does not reference the revisions. Although not entirely clear from the parties' stipulation, I do not understand the General Counsel to allege that Respondent's new handbook rules, revised as of September 14, continue to independently violate the Act. Without regard to whether those revisions adequately repudiate the admitted prior violation of the Act, the General Counsel presents no argument that the revisions continue to violate the Act. Accordingly, I assume, without analyzing the revisions, that with the revised handbook rules, Respondent ceased violating the Act.

[4]See, Joint Stipulation of Facts and Issues at ¶7 ("The legal issue in this case is whether a Notice to Employees, posted at the direction of the National Labor Relations Board at all locations . . . (as opposed to the Burlington, New Jersey facility only), is necessary to remedy the unfair labor practice, notwithstanding Respondent's internal publications of the revisions."); R. Br. at 3 ("The sole issue presented in this case, therefore, is whether NFI should be required to post a complete Board Notice regarding the change in Confidentiality Policy at its facilities nationwide, in addition to [the Burlington facility]") .

to violate the Act, or "in any like or related manner" otherwise interfere with the rights guaranteed to employees under the Act.

Board precedent provides that this notice should be posted by the Employer at each of its facilities at which the unlawful handbook provisions were maintained. See, e.g., *Long Drug Stores of California*, 347 NLRB 500, 501 (2006) ("The Board has 'consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.'") (quoting *Guardsmark, LLC*, 344 NLRB 809, 812 (2005)); *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003) ("we deem it an appropriate remedial measure to require that the rescission of the provision, and the posting of the notice, be coextensive with the Respondent's application of its handbook"); *North American Pipe Corp.*, 347 NLRB 836, 853–854 (2006) (requiring "posting of the notice coextensive with Respondent's application of its handbook"); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990) ("because the Respondent has maintained its [unlawful] rule as a companywide policy, we shall order the Respondent to modify this rule or policy by deleting those portions that we have found to be unlawful, as discussed above, and to post an appropriate Board notice to employees at all its centers where this rule or policy has been or is in effect").

This precedent would seem to settle the issue of the scope of the posting remedy required in this case. The Board's policy, and it is self-evident in its reasonableness, is that the scope of the remedy must be coextensive with the violation found. The rationale for deviating from this Board policy in this specific case must be based on facts and circumstances that justify removing this case from the ambit of the Board's consistent precedent on this issue.

Respondent advances three arguments why posting a notice at each facility where the offending rules were in place is not warranted in this case. The first two are entirely misplaced and must be rejected out of hand.

NFI first contends (R. Br. at 3–7) that it is not a "recidivist or recalcitrant employer" and, therefore, "broad" or "special remedies" are not warranted. Second, and mingled with the argument against "special remedies," is NFI's assertion (R. Br. at 6–7) that requiring it to post a notice at each facility where the handbook was in force constitutes an attempt to remedy "speculative" consequences of an unfair labor practice.

The Board's approval of "broad" or "special" remedies in cases involving egregious respondents or those with a demonstrated proclivity to violate the Act has no bearing on the remedy sought by the General Counsel here. It is true that "special remedies" may include the posting of notices at employer facilities not directly involved with the specific unfair labor practices being remedied. See, e.g., *J.P. Stevens & Co.*, 245 NLRB 198 (1979), enfd. in relevant part 638 F.2d 676 (4th Cir. 1980). But not notwithstanding NFI's rhetorical conflation of the remedy sought in this case with the seeking of "companywide" or "nationwide" remedies, the remedies sought here do not extend to any facility uninvolved in the unfair labor practices found. Nor is the remedy in this case "speculative"—i.e., an effort to remedy an unfair labor practice beyond the violation of employee rights found.

The stipulated fact is that the admittedly unlawful handbooks were maintained at each of Respondent's facilities. Thus, the remedy sought by the General Counsel is tailored to and coextensive with the scope of unfair labor practices alleged, admitted, and found. That the Charging Party (presumably) initially discovered the handbook violation at only one facility, in no way mitigates the unlawfulness of the maintenance of the same handbook provisions at its other facilities. Similarly, that no one associated with those facilities complained about, or was

disciplined over the handbooks, does not mean the Board has no violation to remedy. It is the mere maintenance of handbook provisions that employees would reasonably read as restricting discussion and conduct protected by Section 7 that proves the violation of employee rights *at every facility at which the unlawful rule was maintained*. The violation is not speculative. The fact that no employee complained, the fact that no employee was disciplined—indeed, the fact that there is no evidence of enforcement of the rule—is beside the point precisely because the mere maintenance of the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Under settled precedent,[5] expressly unchallenged by Respondent here,[6] that is sufficient to find an unfair labor practice at every facility at which the unlawful provision was maintained. And having found the unfair labor practice interfered with employee rights, it is reasonable, perhaps incumbent upon the Board, to remedy it in a manner coextensive with the scope of the violation of employee rights. The remedy sought by the General Counsel is not broad, special, or based on speculation about the extent of the unfair labor practices.

Respondent's final contention is more substantial. Respondent contends (R. Br. 7–10) that its voluntary actions to revise the offending rules and distribute notice of the revision to employees at facilities other than Burlington constitute sufficient repudiation of the unfair labor practices to "cure" the violation and render further remedial action at those facilities unnecessary.

The potential for a party that has committed an unfair labor practice to repudiate the unfair labor practice, and thereby obviate the need for a Board-imposed remedy, or even a finding of a violation, has long been a part of Board precedent.[7]

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board articulated its understanding of the steps which a respondent must take to repudiate an unfair labor practice. Drawing together a number of strands from prior cases, the Board in *Passavant* reaffirmed that "under certain circumstances an employer may relieve himself of liability for

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[5] *Lafayette Park Hotel,* supra; *Cintas Corp.*, 344 NLRB 943, 946 (2005) ("the law is clear that the mere existence of such a rule, even if it is not enforced, constitutes an unlawful interference with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act"), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007) ("as we have recently clarified, the '"mere maintenance"' of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice "even absent evidence of enforcement"') (quoting *Guardsmark v. NLRB*, 475 U.S. 369, 374, 376 (D.C. Cir. 2007) (internal quotations omitted)); *Franklin Iron & Metal*, 315 NLRB 819, 820 (1994) ("Nor does it matter if the rule was unenforced or unheeded."), enfd. 83 F.3d 156 (6th Cir. 1996).

[6] Joint Stipulation of Facts and Issues at ¶4 ("under current Board law, which Respondent agrees it will not challenge in these proceedings, these rules are overly broad and violate the Act"). Joint Stipulation of Facts and Issues at ¶5) ("Respondent represents that . . . to the best of its knowledge, no employees at any location have been disciplined or discharged for breach of [the challenged] rules").

[7] I note that while the repudiation of an unfair labor practice is sometimes relied upon to remove the need for a Board finding of a violation, not just the need to order a remedy, Respondent here contends only that its repudiation eliminates the need for further remedying of a violation it admits. R. Br. at 3; Jt. Stipulation at ¶7. Given my resolution of the dispute, the distinction is of no consequence.

unlawful conduct by repudiating the conduct." The Board announced the *Passavant* test, *all* factors of which must be satisfied in order to cure the unfair labor practices:

> To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

In *Passavant*, the unfair labor practices at issue were statements made by an administrative assistant to employees that they would be fired if they participated in a strike. The Board considered the contention that the employer had sufficiently repudiated these violations through its subsequent publication in its employee newsletter of the following notice signed by the employer's administrator:

> It has come to my attention that some of our employees, in response to a question, were told that employees who go out on a strike for economic reasons can be fired. This is not correct.
>
> Employees have a legal right to engage in an economic strike; however, management has a duty to continue operation of the hospital and has a right to permanently replace any employees who do go out on an economic strike. If the striker is permanently replaced, he cannot return to his job when he wishes. He will be recalled only when an opening occurs for which he is qualified.

The ALJ in *Passavant* found this statement to be "an effective repudiation and disavowal" of the unfair labor practices. As discussed, herein, the Board, applying the seven-part *Passavant* test set forth above, did not agree and reversed.

In the instant case, Respondent contends that its revision of the offending handbook rules, and its notice and explanation to employees, "obviate the need for further remedial action." In pressing this contention, Respondent suggests that in the years since *Passavant*, "the Board has loosened its application of the *Passavant* criteria and permitted a greater exercise of discretion based on the reality of the circumstances."

Although Board members, in a number of cases, have expressed unwillingness "to pass on the validity of all the factors required for an effective repudiation as set forth in *Passavant*," it is also the case that *Passavant* remains "extant Board law." *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6 (2007). It is also true, as Respondent points out, that in *River's Bend Health & Rehabilitation* Service, 350 NLRB 184 (2007), the Board adopted an ALJ's dismissal of an 8(a)(5) violation of "relatively minor importance" (a unilateral 75-cent increase in the price of employee meals, actually paid by one employee in three instances), even though the ALJ found that the employer's "repudiation does not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity." Id. at 193.

I will assume, without deciding, that what Respondent characterizes as "slavish adherence" to the *Passavant* factors is not required, and that it is not always necessary that every factor cited in *Passavant* be satisfied in order for a respondent to successfully repudiate a

violation. Still, I think that under the circumstances Respondent's purported repudiation misses not only many of the details, but the gravamen of *Passavant*.

First, it must be stated that the violations at stake here are not trivial, or unimportant, but significant violations. Although there is no evidence of discipline being meted out for violation of these unlawful rules, the flouting of employer rules carries the potential discipline. Indeed, one of the rules declared that "your pay rate and the amount of your paycheck is confidential" and "a private matter between you and The Company and should not be disclosed to others. Failure to comply with this request will be considered grounds for immediate termination." And these unlawful rules were in place and violating the rights of employees at every facility of NFI. While the maintenance of these rules may not have the emotional force of a supervisor orally announcing to employees that they can be discharged for striking, the Board recognizes that employee conversations about wages are at the core of activity covered by Section 7's "mutual aid and protection" clause. *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624 (1986) ("The Board has held that Section 7 'encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment'") (quoting, *Triana Industries, Inc.*, 245 NLRB 1258 (1979)). Indeed, the discussion of salaries has been termed by the Board "an inherently concerted activity clearly protected by Section 7 of the Act." *Automatic Screw Prods. Co.*, 306 NLRB 1072 (1992), enfd w/o op. 977 F.2d 582 (6th Cir. 1992). This is not a case about trivialities or technicalities, but about rules that can reasonably be understood to impede fundamental Section 7 rights.

Second, Respondent's repudiation was untimely under the standards set forth in *Passavant*. The offending handbook provisions have long been in place. They were modified more than 10 weeks after the Union's filing of an amended charge challenging the provisions, and more than 3 weeks after the General Counsel issued a complaint alleging that maintenance of the provisions violated the Act. By comparison, the Board in *Passavant* found the "disavowal was not timely" where the disavowal was not made until 7 weeks after the commission of the unlawful unfair labor practice, but just 3 days after the filing of the charge mooting the issue. Even if timeliness is measured from the time the charge was filed, and not from the time that the unfair labor practice first occurred, Respondent's revision was untimely under *Passavant*.

Moreover, specifically as to timeliness, the Board in *Passavant* stated: "Nor can we ignore the fact that Respondent delayed until very nearly the eve of the issuance of the complaint before publishing its disavowal." Here, NFI waited until more than 3 weeks *after* issuance of a complaint, with a trial on the matter set, to issue its "disavowal." While NFI asserts that it should be "applauded and embraced" for voluntarily repudiating its unlawful policies, like the Board in *Passavant*, I cannot ignore that NFI took its voluntary steps only after the prosecutor had loaded, cocked, and aimed his legal weapon. Clearly, NFI's repudiation was untimely under *Passavant*.[8]

Similarly, under the standards set forth in *Passavant*, NFI's repudiation was neither "unambiguous" nor "specific in nature to the coercive conduct." In *Passavant*, the Board concluded that the employer's remediation statement "was neither sufficiently clear nor sufficiently specific" as "Respondent did not admit any wrongdoing but merely informed

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[8]The Board in *Passavant* rejected the ALJ's reliance on *Kawasaki Motors Corp.*, 231 NLRB 1151 (1978) as "misplaced," distinguishing that case, in part, on the basis that "in *Kawasaki* the employer's remedial action was completely voluntary with no threat of the Regional Director's further action." 237 NLRB at 139. The Board noted that, by contrast, in *Passavant*, "Respondent admittedly published its statement as a result of the unfair labor practice charge filed in this case, almost 2 months after the threats were uttered." Id.

employees that information given them was 'not correct.'" The Board also faulted the respondent in *Passavant* for failing to provide more specificity by failing to name the administrative assistant who committed the unfair labor practice, "nor does it mention the circumstances in which [the assistant] made the unlawful threats."

In this case, NFI's remediation notice does not meet even the failed standards of clarity and specificity rejected in *Passavant*. NFI's notice does not concede that the handbook provisions were unlawful, or even incorrect. Indeed, NFI's notice does not even admit that the provisions limited employees in discussion of wages. Rather, NFI's notice explains that it is changing the handbook provisions to "eliminate any limits that employees believe may exist on their right to discuss their wages and working conditions." The phrasing is not without significance. Respondent is saying that the changes are being made to correct the subjective (perhaps, misplaced) views of employees about the rules. It avoids admitting that the prior rule limited employee discussion, and avoids admitting any wrongdoing by NFI. This evasion is not impressive in the context of a legal standard for remediation that values admissions of wrongdoing, explanations of the circumstances of the unlawful conduct, and much more than announcements that the old provisions were incorrect, an insufficiency that is not even met by NFI's notices. See, *Branch Intern'l Services*, 310 NLRB 1092, 1105 (1993) ("Respondent's attempt to 'clarify' the 'misunderstanding' clearly does not meet the Board's test for repudiation of the unfair labor practice. *Passavant Memorial Hospital*, 237 NLRB 138 (1978) requires a disavowal of the unlawful Act"), enfd w/o op. 12 F.3d 213 (6th Cir. 1993).

Finally, and, according to the Board in *Passavant*, "most importantly," NFI's notice to employees "did not assure employees that in the future Respondent would not interfere with the exercise of their Section 7 rights by such coercive conduct." Indeed, as the General Counsel presses, NFI's notice provides no indication that the revisions in the rules were made to secure a Federal right for employees, or to conform NFI's handbook and policies to Federal law. As far as NFI's notice to employees lets on, this change is unilaterally being carried out by NFI, for its own purposes, and is not grounded in or otherwise buttressed by Federal law. Indeed, as noted, above, the phrasing of the explanation for the revision leaves doubt as to whether the Employer is motivated by a desire to change the rule, or simply a desire to change employees' "beliefs" about the rule. All of this adds to the ambiguity and lack of specificity, described above. It also flatly fails to provide assurance to employees that their Section 7 rights—violated by these rules whether the employees know it or not—are secure in the future. As far as someone reading the notice can ascertain, what NFI gives, NFI can take away.

The lack of reference to even the potential legal basis for the change in the handbook is instructively compared to the remediation notice in *River's Bend Health*, 350 NLRB 184 (2007), a case relied upon by NFI. As discussed above, in that case, the Board accepted the remediation effort as to a "relatively minor" unfair labor practice, even though every *Passavant* factor was not satisfied. Still, as to this "most important" *Passavant* factor, the employer in *River's Bend* was far more forthcoming than NFI. Thus, in *River's Bend,* the employer posted a notice entitled "Unfair Labor Practices," which, in listing the Region's findings, stated "[t]he 50 cent price increase in meals was not legal. River's Bend will agree to cancel the price increase and reimburse employees." 350 NLRB at 193. In a subsequent memo, the employer stated:

> We have been advised by the Regional Director for the National Labor Relations Board that River's Bend improperly increased meal prices on February 16, 2004, because we changed the meal price without negotiating with the union. The Regional Director has requested that we return meal prices to the prices that were in effect prior to February 16, 2004, and reimburse any bargaining unit employees who paid the increased price. We are honoring the Regional

> Director's request, effective immediately, by returning meal prices to $ 2.25 for dinner and $ 3.00 for lunch, and reimbursing the price difference to any bargaining unit employees who purchased meals since February 16. [Id.]

Based on this, the Board in *River's Bend* adopted the ALJ's finding that "the memoranda, at least implicitly, concede that the price increase violated the Act due to Respondent's failure to bargain with the Union and implicitly provides assurance that Respondent will not increase meal prices in the future without bargaining." Nothing remotely as straightforward regarding employees' Section 7 rights, NFI's legal situation, or its intent to not interfere with employees' section 7 rights in the future, can be gleaned from NFI's cryptic explanation that the rule change was being undertaken by NFI to remove any limitations on discussion "employees believe may exist."

Under these circumstances, Respondent's remediation is inadequate. I accept that NFI's actions were "free from other proscribed illegal conduct"—other alleged misconduct was confined to the Burlington facility, and settled, and, therefore, never proven. In addition, there is no fault to be found with the publication and distribution of the repudiation notice to employees. That notice went to employees at each facility (other than at Burlington). These two parts of *Passavant* are satisfied.

But compliance with these two parts of *Passavant* cannot transform an inadequate repudiation into a "cure" that can substitute for Board action. It is the Board's role to vindicate employees' Section 7 rights when violated. Indeed, the standard Board notices that are posted make clear that the vindication of Federal rights are at the core of remedial action ordered by the Board. Respondent's purported remedy for its violations of the Act would obfuscate the role of Federal rights in the rule change announced by Respondent. Respondent's remediation notice fails to mention, let alone assure future compliance with employee Section 7 rights. It gives no hint of the Employer's legal obligations, wrongdoing, or even a suggestion that the timing of the announcement was related to the threat of action by the Board's General Counsel. The heart of *Passavant* is the timely, specific, and unambiguous acknowledgement by a respondent to employees of how it has run afoul of their Section 7 rights and that it will not do so in the future. All of this is missing from Respondent's remediation notice. This cannot satisfy the Board's standards for effective repudiation.

Respondent shall be ordered to post a Board-prepared notice at all facilities where its employee handbook has been in effect.

CONCLUSIONS OF LAW

1. Respondent NFI Industries, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party Warehouse Employees Union Local 169 a/w International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times through September 14, 2009, Respondent maintained rules and policies in its employee handbook that were overly broad in violation of Section 8(a)(1) of the Act.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist. It also must be ordered to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall post an appropriate informational notice, as described in the Appendix, attached. This notice shall be posted in all its facilities where its employee handbook as been, or is in effect, wherever notices to employees at those facilities are regularly posted, for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 4 of the Board what action it will take with respect to this decision.

In this case, the evidence is undisputed that Respondent has revised the offending handbook rules. Accordingly, the remedy need not include direction to undertake that revision. Further, the record also establishes that at each facility other than the Burlington facility, Respondent has distributed to employees a letter that furnishes all current employees with the language of the revised lawful provisions of the handbook and along with the language that has been rescinded. This satisfies the Board's traditional requirement that either inserts for the current handbook, or a revised handbook, be provided to employees. Thus, this affirmative action will be required only at any facility where Respondent has not, to date, undertaken such action, namely, the Burlington facility.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

Respondent, NFI Industries, Inc., Burlington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad provisions in its employee handbook at any of its facilities that prohibit, or reasonably could be read to prohibit, employees from discussing wages, hours, and other terms and conditions of employment, among themselves or with nonemployees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[9]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Furnish all current employees at the Burlington facility with inserts for the current edition of the NFI employee handbook that (1) advise that the unlawful provisions above have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised reference guide that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

(b) Within 14 days after service by the Region, post at each of its facilities in the United States copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 2, 2009.[11]

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. January 8, 2010.

_____
David I. Goldman
U.S. Administrative Law Judge

[10]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11]The unlawful handbook provisions were in effect "at all material times." Their maintenance was a continuing violation. January 2, 2009, is the first date within the limitations period—six months before the July 2, 2009 filing of the amended charge that first alleged the maintenance of unlawful handbook provisions.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain overly broad provisions in our employee handbook that prohibit, or reasonably could be read to prohibit, you from discussing wages, hours, and other terms and conditions of employment among yourselves or with nonemployees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, as we have previously done for employees at all other facilities where overly broad provisions of our employee handbook were in effect, furnish all current employees at our Burlington, New Jersey facility with inserts for the current edition of the NFI employee handbook that (1) advise that the unlawful provisions above have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised reference guide that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

NFI Industries, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106–4404
Hours: 8:30 a.m. to 5 p.m.
215–597–7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215–597–7643.